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MODEL COLLOQUIES

Prepared by the

STORAGE

DISTRICT COURT COMMITTEE ON CRIMINAL PROCEEDINGS

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Massachusetts District Court
model colloquies

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CONTENTS

Alford Plea 3

Bail Warning 4

Child Witness 5

Drug Examination Rights 6

Filing One or More Charges after a Guilty Finding 7

Joint Representation 9

Marriage Certificate Without Delay 14

Marriage of Minor 15

Marital Privilege 20

Rendition 23

Right to Represent Self at Trial 27

Tender of Guilty Plea or Admission 29

Waiver of Counsel 34

Waiver of Fifth Amendment Rights by Witness 36

Waiver of Jury Trial 40

Waiver of Probation Violation Hearing 42

ALFORD PLEA

Counsel: Your honor, the defendant is not admitting that (she) (he) committed the offense charged. However, (she) (he) will be pleading guilty.

The defendant is sworn.

The Court: **Will the defendant give (her) (his) reasons for pleading guilty?**

The judge must resolve any dispute between the defendant's plea of guilty and any protestation of his or her innocence.

The Court is satisfied with the defendant's reasons for pleading guilty.

Is the defendant's plea of guilty made voluntarily, willingly and freely? Have there been any threats or promises made to the defendant?

Will the Commonwealth outline the facts and the extent and weight of its case against the defendant? . . . .

Will the defense indicate any defenses it has and give its reasons for recommending the guilty plea? . . . .

I find that the Commonwealth's case is overwhelming, the defendant's possible defenses are tenuous, and the plea is otherwise intelligently and voluntarily made, and it is accepted by the Court.

BAIL WARNING

After defendant has been arraigned and counsel appointed, and a date set for pretrial conference:

Ms./Mr. _____, your next date in court is on *[Day of week and date]*.

You must be in *[Courtroom, if known in advance]* **of this court at 9 A.M.**

If you are charged with any new offenses or if you violate any release condition

If released under G.L. c. 276, §§ 42A or 58A: **given to you**

(or)

If released under G.L. c. 276, § 87: **agreed to by you**

while this case is pending, you may be arrested and held without bail for up to (60 days) (*If released under § 58A*: **90 days)**.

By that date you must also pay the counsel fee of $ _____ which I have imposed for Attorney _____'s services.

G.L. c. 276, § 58

CHILD WITNESS

In posing questions to determine a child's competence as a witness, a judge is focused on three issues:

- *the child's ability to recall and relate*
- *the child's ability to distinguish truth from lies, and*
- *the child's awareness of the importance of telling the truth.*

The judge should be prepared to vary his or her questions depending on the child and the circumstances. The following are offered as some suggestions.

It is recommended that only the judge pose questions to the child, but that the attorneys be given an opportunity to request the questions to be posed.

Could you tell me your name, please?

How old are you?

What is the name of your school? What grade are you in? What is your teacher's name?

Do you know what my job is?

Do you understand the difference between the truth and a lie? What is the difference?

Do you know what might happen if someone tells a lie?

After ascertaining the date of the alleged offense: **Do you remember where you went to school in (*[year]*) (*[grade]*) ?**

Do you remember your teacher's name (that year) (in that grade) ?

DRUG EXAMINATION RIGHTS

Ms./Mr. _____, you are charged with a drug offense. You have a right to request an examination to determine if you are a drug dependent person who would benefit from treatment.

If you are interested in such treatment, you should discuss it with your counsel and with the probation department. A request for treatment as a drug dependent person must be made in writing and within 5 days.

G.L. c. 111E, § 10

FILING ONE OR MORE CHARGES
AFTER A GUILTY FINDING

Ms./Mr. _____, (I have been asked) (I am considering whether) to file the following charge(s) in this case: *[charges to be filed]*.

"Filing" a charge means that you have been found guilty of that criminal charge, but that I will not impose any sentence for it at this time. You and the Commonwealth must both consent before a charge may be filed.

If I file this (these) charge(s), you will have the right to request that you be sentenced on it (them) at any time.

The Commonwealth may also request that the charge(s) be brought forward and that you be sentenced on it (them) at any time (until *[date]*):

- **if any related conviction is reversed or vacated, or**
- **if the Commonwealth proves by a preponderance of the evidence that you have committed a new criminal offense (or that *[other condition(s) of continued filing being imposed by the Court]*).**

If that happens and the charge(s) is (are) removed from the file, you may be sentenced on it (them) and that could result in additional punishment in this case.

Do you understand everything that I have said? Do you consent to placing this (these) charge(s) on file (subject to these conditions)?

To the prosecutor: **Does the Commonwealth consent to placing this (these) charge(s) on file (subject to these conditions)?**

NOTE:

The model colloquy is addressed to the practice that is governed by Mass. R. Crim. P. 28(e): filing one or more charges after a guilty finding or verdict without imposing a sentence. Rule 28(e) provides:

> **Filing.** The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may not be removed from the file, and may specify any events that may cause the case to be removed from the file. The defendant shall file a written consent with the court as to both the filing of the case and any time limit or events regarding removal from the file. Prior to accepting the defendant's consent, the court shall inform the defendant on the record in open court:
>
> (i) that the defendant has a right to request sentencing on any or all filed case(s) at any time;
>
> (ii) that subject to any time limit imposed by the court, the prosecutor may request that the case be removed from the file and sentence imposed if a related conviction or sentence is reversed or vacated or upon the prosecutor's establishing by a preponderance of the evidence either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and
>
> (iii) that if the case is removed from the file the defendant may be sentenced on the case.
>
> In sentencing the defendant after the removal of a case from the file, the court shall consider the over-all scheme of punishment employed by the original sentencing judge.

The model colloquy does not address the different practice of filing a charge "without a change of plea" and without a guilty finding or verdict. A violation of a condition of filing after a guilty finding or verdict results in sentence being imposed, while a violation of a condition of filing without a guilty finding or verdict results in the case being restored to the trial list. Both practices require the consent of the defendant as well as the Commonwealth.

After taking a guilty plea or admission to sufficient facts, a judge may not, without entering a guilty finding, file a charge with conditions in anticipation of eventual dismissal. The appropriate mechanism in that situation is a continuance without a finding. *Commonwealth v. Powell,* 453 Mass. 320, 901 N.E.2d 686 (2009).

JOINT REPRESENTATION

The judge's inquiry must include: (1) Giving each defendant the opportunity to inquire as to the nature and consequences of joint representation; (2) Determining that each defendant has discussed the potential for conflicting interests with his or her attorney; (3) Indicating that each defendant understands that separate counsel may be retained or, where appropriate, appointed; and (4) Where parties are closely related, the judge should be cognizant of the possibility of domination of or martyrdom by one defendant or the other. Commonwealth v. Connor, *381 Mass. 500, 503-506 (1980)*; Commonwealth v. Davis, *376 Mass. 777, 784-785 (1978);* Commonwealth v. Wooldridge, *19 Mass. App. Ct. 162, 169 (1985).*

Preliminary. **I understand that (both) (all) of you want to be represented by the same attorney. Is that correct? Before I can permit that arrangement, I have to ask you a number of questions to be sure that you understand completely what that choice could mean to you. (Either) (Any) of you should stop me if you have any questions about anything I say.**

Each of you has the right to be represented by an attorney who is entirely on your side and able to represent your interests alone without any other loyalties. Whenever one lawyer represents two or more defendants who are codefendants in the same criminal case, it can easily happen that a conflict of loyalties may develop and become a problem for the lawyer and the clients.

Individual information (from each defendant individually):

- Name, age, school.
- Medication, drugs, alcohol.
- Mental illness.

General information. **I want you to understand that by asking these questions, I am not suggesting that your attorney is not completely competent. But even a competent lawyer can be put into a position of conflicting loyalties.**

Non-congruent interests. **You should realize that your interests can be in conflict even if they are not completely opposed. (Both) (All) of you share a general interest in being found not guilty, but the best road for trying to get there may not be the same for each of you. There is a conflict between your interests any time what is best for one of you is different from what is best for your co-defendant. It can happen that the best interests of (both) (all) of you are the same throughout the trial, but it also, and often, happens that at some point your interests will go in different directions. Do you (both) (all) understand that?**

Examples. **Many decisions are made by defense counsel during trial: whether to plea bargain, what defense theory to present, what witnesses to call, which defendant — if any — should testify, how to cross-examine prosecution witnesses, how to object to the**

prosecution's evidence, how to argue at the end of trial, and — if the jury convicts the defendants — what sentencing recommendations your lawyer will make for each of you. Do you realize that these decisions could be made on the basis of what may be best for (your codefendant) (one of your codefendants), rather than what is best for you? Do you realize that if you had an attorney without any conflict, that all of these decisions would be made with only your interests in mind?

Discussion with counsel. **Has each of you discussed with your attorney the conflict of interest problems that are involved when one lawyer represents several clients in the same criminal case, and also your personal risks in this particular case from such an arrangement?**

> *Optional:* **Would either of you like me to appoint another lawyer just for the purpose of discussing this matter with you?**

Situation could change. **Do you realize that even if today it appears that there will be no conflict between your interests, that this could change at any point before or during trial? Do you understand that even if I permit one lawyer to represent you (both) (all) now, later events as the trial develops may require me to change my mind and**

withdraw that permission, and then one of you would have to obtain a different attorney?

Waiver of appellate claims. **Do you both understand that by giving up at this time your right to have counsel free of possible conflict of interest, you also give up your right, if you are convicted, to appeal your conviction on the grounds that your attorney had a conflict of interest?**

Right to alternate counsel. **If there is any question remaining in your mind, do you both understand that you have a right to hire a different attorney or, if you cannot afford to do so, to have a lawyer appointed by the Court at a reduced cost or no cost to you?**

To each defendant individually: **Ms./Mr. _____, did you independently and voluntarily choose Attorney _____ as your attorney? Have you considered whether to obtain a separate lawyer?** *If yes:* **Why did you decide not to?**

To the attorney: **Have you considered the possibility of conflict of interest due to multiple representation of your clients? Have you discussed the nature of conflicts with your clients? Do you believe your clients have knowingly and voluntarily waived the effect of any conflict?**

On the basis of the defendants' answers in open court and my questioning of Attorney _____, I find that the defendants are fully advised of any potential conflict of interest that their present attorney, Ms./Mr. _____, may have because of (her) (his) joint representation of them, and that they may obtain separate counsel; that they have discussed the risks with their attorney; that each of these defendants fully understands the possible conflicts and risks; and that each defendant has knowingly and voluntarily waived any objection and is satisfied to have Attorney _____ represent (him) (or) (her) in the trial of these complaints.

MARRIAGE CERTIFICATE WITHOUT DELAY

Parties sworn.

Please state your names.

Have you made arrangements for the marriage ceremony? When and where will it take place?

Would it be practical to delay your wedding until the waiting period for a marriage license elapses? Please explain.

Is this your voluntary decision?

I find that it would be expedient to authorize solemnization of this marriage without delay.

NOTES:

1. ***G.L. c. 207, § 30. Certificate of intention of marriage; dispensing with three days' notice.*** "Upon application by both of the parties to an intended marriage, when both parties are residents of the commonwealth or both parties are non-residents, or upon application of the party residing within the commonwealth when one of the parties is a resident and the other a non-resident, . . . a justice of a district court . . . may, after hearing such evidence as is presented, grant a certificate stating that in his opinion it is expedient that the intended marriage be solemnized without delay. Upon presentation of such a certificate, . . . the clerk or registrar of the town where the notice of intention has been filed shall at once issue the certificate prescribed in section twenty-eight."

2.***Exped ient:*** “appropriate; convenient; useful” (Webster).

MARRIAGE OF MINOR

To minor who intends to marry: **Please state your name and age. How far have you gone in school?**

> *If appropriate:* **Did you attend regular classes or special education classes?**

Are you employed? Is your fiancé(e) employed? Is it your intention to marry ___*[Intended spouse]*___ **? Have you considered waiting to marry until you are eighteen years old, or older? Why do you wish to marry at this time? Are both of your natural parents present?**

To each parent: **Please state your name. Are you the natural (mother) (father) of** _____*[Minor]*_____ **? Do you consent to the marriage of your (daughter) (son) to** ___*[Intended spouse]*___ **?**

> *If one natural parent is not present:* **Why is** ___*[Minor's]*___ **natural (mother) (father) not present? Does (she) (he) reside in Massachusetts?**

> *If absent parent who would be required to consent lives outside Massachusetts, determine whether he/she has been notified of the proceedings. If not, an order of notice should be made, and compliance therewith verified, before a hearing may be concluded.*

If appropriate: **Has a court awarded custody to you? Do you have joint custody with** *[Absent parent]* **? *If not:* Has a court determined that** *[Absent parent]* **is unfit to have custody of** *[Minor]* **? *If so, determine which court and date of finding.***

If appropriate: **Has a court found that (she) (he) is incapable of consent by reason of mental illness or incapacity? *If so, determine which court and date of finding.***

If appropriate: **Has (she) (he) deserted (her) (his) family? *If so:* Please explain.**

If minor's legal guardian is present: **Which court has made you** *[Minor's]* **legal guardian? Do you have a copy of the court order?**

Reasons for consent to marry. **Why do you believe that it is appropriate for** *[Minor]* **to enter into this marriage before (she) (he) is eighteen years old? Have you considered withholding your consent to marry until** *[Minor]* **is eighteen years old? For what reasons do you believe that this Court should allow** *[Minor]* **to marry before (she) (he) is an adult in the eyes of the law?**

Finding:

I find that both of the natural parents of _____[Minor]_____ consent to (her) (his) marriage to _____[Intended spouse]_____ .

or

I find that _____[Natural parent residing in Massachusetts]_____ consents to this marriage, and that _____[Natural parent residing outside Massachusetts, who is not otherwise disqualified from consenting]_____ has had notice of this proceeding and has not objected thereto.

or

I find that neither of _____[Minor's]_____ natural parents (are living) (reside in Massachusetts), and that the legal guardian with custody of _____[Minor]_____ has consented to this marriage.

or

I find that the parents of _____[Minor]_____ are disqualified from consenting to this marriage because (they have abandoned the family) (they have been found unfit to have custody of the minor) (they have been found to be incapable of consenting by reason of mental illness or incapacity, namely _____). I further find that the legal guardian with custody of _____[Minor]_____ has consented to this marriage.

The marriage of ____*[Minor]*____ **and** ____*[Intended spouse]*____ **is (allowed) (denied).**

NOTES:

1. ***When both parties are minors.*** If both persons intending to marry are minors and the judge poses these questions to both simultaneously, the judge should make appropriate changes in the language above to indicate that the issues involved have been considered and decided separately for each minor.

2. ***G.L. c. 207, § 25. Minors; authorization of marriage.*** " . . . [A] district court within the judicial district of which, a minor under the age [of 18] resides **may, after hearing, make an order allowing the marriage of such minor**, if the parents or surviving parent of such minor, or, if only one such parent resides in the commonwealth, that parent, or, if neither such parent is alive and a resident thereof, or if the parent or parents qualified as aforesaid to consent are disqualified as hereinafter provided, a legal guardian with custody of the person of such minor has consented to such order. If a parent has deserted his family, or if found to be incapacitated by reason of mental illness and incapable of consent, or if found unfit under the provisions of [G.L. c. 201, § 5] to have custody of such minor, it shall not be necessary to obtain his consent to such order. If a parent whose consent would be required if living in the commonwealth lives outside thereof and the address of such parent is known, such notice of the proceedings shall be given him as the . . . district court may order. Said court may also after hearing make such order in the case of a person whose age is alleged to exceed [18], but who is unable to produce an official record of birth, whereby the reasonable doubt of the clerk or registrar, as exercised under section thirty-five, may be removed. Upon receipt of a certified copy of such order by the clerk or registrar of the town where such minor resides, he shall receive the notice required by law and issue a certificate as in other cases."

3. ***Maturity of minors to make other decisions.*** "We recognize that our laws provide **no bright line** as to when a minor reaches an age to make certain decisions in life. In criminal proceedings a seventeen year old is deemed capable of making all decisions relative to that proceeding. An emancipated minor and a minor who is married, divorced, or widowed may consent to his or her own medical treatment, including an abortion and sterilization. G.L.c. 112, § 12F. On the other hand, a minor may not purchase cigarettes (G.L.c. 64C, § 10) or alcohol (G.L.c. 138, §§ 34 & 34A); may not vote (G.L.c. 51, § 1); and may not serve on a jury (G.L.c. 234, § 1)" (emphasis added). *Matter of Rena,* 46 Mass. App. Ct. 335, 337 n.3 (1999) (maturity to make informed decision for medical procedure).

"The Illinois Supreme Court has determined that the test that should be applied in circumstances such as this is **whether the minor is mature enough to make an informed decision.** *In re E.G.,* 133 Ill.2d 98, 110-112 (1989). This concept has been adopted by our Legislature in allowing a judge to authorize a minor to have an abortion without parental consent if the judge determines that the minor is mature enough to make an informed decision. G.L. c. 112, § 12S. See *In re Swan,* 569 A.2d 1202 (Me. 1990), in which the Maine Supreme Judicial Court **rejected a substituted judgment test in favor of giving preference to the wishes of a minor if the minor has the capacity to weigh the risks and benefits involved.**" *Rena, supra* at n.2.

". . . [T]here is **no fixed age** when emancipation occurs. It does not occur automatically upon reaching the age of majority" (emphasis added). *Turner v. McCune,* 4 Mass. App. Ct. 864, 865 (1976) (interpreting child support provision of divorce agreement).

" . . . In most States emancipation is sufficiently shown if the minor, having **attained years of discretion, maintains a separate way of life with his parents' consent**. See Restatement 2d: Conflict of Law, § 22, comment f (1971)." *Hershkoff v. Board of Registrars of Voters of Worcester,* 366 Mass. 570, 577 (1974) (emancipated child can choose domicil).

G.L. c. 231, § 85P. Age of majority; legal capacity. "Except as otherwise specifically provided by law, any person domiciled in the commonwealth who has reached the age of **eighteen** shall for all purposes, and any other person who has reached the age of eighteen shall with respect to any transaction governed by the law of the commonwealth, be deemed of full legal incapacitated for some reason other than insufficient age."

G.L. c. 112, § 12F. Emergency treatment of minors. ". . . Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the **armed forces**; or (iv) she is **pregnant** or believes herself to be pregnant; or (v) he is **living separate and apart** from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to [G.L. c. 111, § 6]; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease . . . Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

G.L. c. 265, § 13B. Indecent assault and battery on child under fourteen. " . . . In a prosecution under this section, a child under the age of **fourteen** years shall be deemed incapable of consenting to any conduct of the defendant for which said defendant is being prosecuted" (emphasis added).

G.L. c. 265, § 22A. Rape of child; use of force. "Whoever has sexual intercourse or unnatural sexual intercourse with a child **under sixteen** . . . ." (child incapable of consent).

G.L. c. 64C, § 10. Regulation of vending machines [&] sales to children [under 18]. ". . . Any person who shall sell a cigarette to a person **under eighteen** or, not being his parent or guardian, give a cigarette or snuff or tobacco in any form to any person under eighteen, shall be punished . . . ."

MARITAL PRIVILEGE

I. WITNESS CLAIMING PRIVILEGE

Witness claiming privilege sworn.

Please state your name.

(Ms. /Mr.) *[name of witness]* **, I have been told that you wish to assert your privilege not to testify in this case. I am going to ask you a few questions about this.**

Are you married to the defendant, *[name of defendant]* **?**

When and where were you married?

Are you still legally married?

Do you wish to assert your right not to testify in this case because you are married to the defendant? *[If yes, witness is excused.]*

> *[Optional, where witness is alleged victim:]* **Do you understand that the prosecution may not be able to prosecute this case if you do not testify?**

II. WITNESS WAIVING PRIVILEGE

Witness waiving privilege sworn.

Please state your name.

(Ms./Mr.) *[name of witness],* **before you begin your testimony in this case, I have been told that you may have a privilege not to testify in this case. I have a few questions about this.**

Are you married to the defendant, *[name of defendant]* **?**

When and where were you married?

Are you still legally married?

Do you understand that, because you are married to the defendant, you have the right not to testify in this case?

Do you understand that you alone will make the decision whether or not to testify, and that if you decide not to testify, you will be excused as a witness in this case?

Do you have any questions about your right to testify?

Do you wish to assert your right not to testify?

If the witness indicates she/he will testify:

Are you giving up your right not to testify willingly, freely, and voluntarily?

I find the witness has knowingly and voluntarily waived the marital privilege.

NOTES:

1. ***G.L. c. 233, § 20. Competency of witnesses; husband and wife.*** "Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:

> "Second, Except as otherwise provided in [G.L. c. 273, § 7] and except in any proceeding relating to child abuse, including incest, neither husband nor wife shall be compelled to testify in the trial of an indictment, complaint or other criminal proceeding against the other."

(Contrast marital disqualification at G.L. c. 233, § 20: "neither husband nor wife shall testify as to private conversations with the other," except in certain cases, e.g. where spouse is victim.)

2. ***Privilege depends upon marital relationship at time of testimony.*** In contrast to the disqualification for private spousal conversations, which is based upon the existence of a marital relationship at the time of the conversation, the privilege may be invoked only where a valid marital relationship exists at the time of testimony. *Commonwealth v. Barronian,* 235 Mass. 364, 366, 126 N.E. 833, 834 (1920) ("private conversations in this sense can occur only during the existence of marriage").

3. ***Privilege is that of witness, not spouse/defendant.*** The witness-spouse holds the testimonial privilege, not the defendant. See Young, Pollets & Poreda, Evidence § 504.1 (1998).

4. ***Privilege must be waived willingly.*** A spouse may testify against the other only if willing to do so. The privilege is one that he or she alone can claim, and one that can be waived over the objection of the other spouse. As a matter of "good trial practice the judge should satisfy himself, outside the presence of the jury, that the spouse who is about to testify against the other in a criminal proceeding knowingly waives his or her statutory privilege." *Commonwealth v. Stokes*, 374 Mass. 583, 374 N.E.2d 87 (1978).

5. ***Waiver of the marital privilege.*** Where the defendant claimed on appeal that his wife, who had waived the testimonial privilege after a voir dire, tried to retract her waiver during her testimony, and that his lawyer was ineffective for not moving for a mistrial or for the testimony to be stricken. *Held*, that the defendant husband was not owner of his wife's marital privilege not to testify against him and thus, he had no standing to contest alleged infringement of wife's privilege, where, as here, there is no claim that the waiver was not voluntary. *Commonwealth v. Sylvia,* 35 Mass App. Ct. 310, 317, 619 N.E.2d 360 (1993).

But see Commonwealth v. *Rosa,* 412 Mass. 147, 161, 587 N.E.2d 767 (1992), where unusual and egregious circumstances may have affected the voluntariness of the waiver of a testimonial privilege, the court ruled that a defendant, at retrial, did have standing to challenge the introduction of his wife's testimony from the first trial, on the grounds that her waiver of the testimonial privilege may not have been voluntary. If the wife's decision to waive her marital privilege at the defendant's first trial on charges of rape, murder, and kidnapping was not voluntary, then introduction of her evidence at the second trial on the same charges would, in the court's view, "offend [...] fundamental fairness." *Id.* at 162.

RENDITION

During arraignment:

You are before this court today because it is alleged that you are a fugitive from justice in the state of *[name of state]*. **This means that you have been (charged with a crime in that state) (or) (that you were convicted of a crime in that state and escaped incarceration) (or) (that you have violated terms of [probation] [bail] [or] [parole]) in** *[name of state]* , **and that** *[name of state]* **has made a demand for your surrender.**

You have the right to be represented by an attorney. You may hire an attorney, or represent yourself, or ask the court to appoint an attorney for you if you cannot afford to hire one yourself. What do you wish to do?

After counsel is arranged or waived and after counsel and defendant have had an opportunity to confer:

Commonwealth, in what manner does the state of *[name of state]* **allege that the defendant is a fugitive?**

Here the court conducts an identification hearing. If as a result it appears that the person held is the fugitive sought:

Commonwealth, will there be a request for bail on the fugitive charge?

The defendant must be held without bail if the offense in the requesting state is punishable by death or life imprisonment. Otherwise, the defendant may be admitted to bail with or without sureties. G.L. c. 276, § 20D.

Your case will be continued to a date no more than thirty days from now, to give the Governor of Massachusetts time to issue a rendition warrant. If the warrant has not issued by that date, your case may be continued for up to an additional 60 days.

You have the right to challenge the request that you be surrendered to the state of *[name of state]*. **To challenge the request, you have the right to the issuance and service of a Governor's warrant and to apply for a writ of habeas corpus in the Superior Court. In that proceeding, you would only be able to challenge whether the warrant is sufficient on its face, whether you are in fact the person named on the warrant, and whether you are in fact a fugitive from justice.**

You also have the right to voluntarily return to the state of *[name of state]* **without waiting for the Governor's warrant to issue. You may exercise that right by signing in my presence a form by which you consent to return to** *[name of state]* **and you waive your rights to the issuance and service of a Governor's warrant for your interstate rendition and to seek a writ of habeas corpus. If you do,**

arrangements will be made for your surrender to authorities from the state of *[name of state]* **.**

Do you understand what I have said to you? Have you had enough time to discuss these matters with your attorney? How do you wish to proceed?

If the defendant intends to waive the issuance of a Governor's warrant and executes the waiver form provided by the court:

I find that the defendant has knowingly, intelligently and voluntarily waived his (her) rights to the issuance of a Governor's warrant, and will allow it.

If the defendant intends to wait for a rendition warrant to issue:

Your case is continued to *[date not more than 30 days]* **to give the Governor time to issue a rendition warrant. If the warrant has not issued by that date, your case may be continued for up to an additional 60 days.**

NOTES:

1. ***G.L. c. 276, §§ 11 - 20R*** governs interstate rendition.

2. ***Timing of continuances.*** See G.L. c. 276, § 20C, providing for a first continuance of up to 30 days, and G.L. c. 276, § 20E, permitting an additional 60 day continuance thereafter.

3. ***Rights of arrested person.*** The court "shall inform such person of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and, if the prisoner or his counsel shall state that he desires to test the legality of his arrest, such justice shall fix a reasonable time to apply for a writ of habeas corpus." G.L. c. 276, § 19.

4. ***Inquiry into guilt or innocence.*** The defendant may not use the hearing to inquire into issues of guilt or innocence; he may inquire into whether he is the same person who is charged with a crime in the other state. G.L. c. 276, § 20H.

5. ***Waiving Governor's warrant.*** The procedure for waiving a Governor's warrant is set forth at G.L. c. 276, § 20J.

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RIGHT TO REPRESENT SELF AT TRIAL

Mr./Ms. _[defendant]_ , you have the right to have an attorney represent you in this matter. If you are indigent, an attorney will be provided to you by the state. As you probably understand, an attorney is a person with special training and experience in the law who is able to provide advice and guidance to a person facing criminal charges. If an attorney is appointed to represent you, that attorney will work solely for what is best for you.

You also have a constitutional right to represent yourself in this matter if you choose. Neither the prosecutor nor I can be your attorney. If you choose to represent yourself in this matter and waive your right to an attorney, you run the risk that the result might not be what you expect and you may overlook some defense or future consequence an attorney might have anticipated for you.

You should be aware that, even though you are not an attorney, all court rules including the rules of evidence, will apply to this trial.

The maximum sentence for the offense(s) with which you are charged, is _[maximum and any minimum mandatory sentence]_ in the House of Correction.

How old are you?

How far did you go in school?

Today, do you have any mental or psychological problems that interfere with your ability to understand me or make decisions?

Have you had any drugs, alcohol or medicine today?

> *If yes to medicine:* **Is this medicine prescribed by a doctor? Are you taking it as prescribed? Does it interfere with your ability to understand me or to make decisions?**

Have you understood everything I have said?

Is it still your wish to waive your right to an attorney, and instead to represent yourself on this charge of *[offense]* **, understanding that you will not be able to change your mind later?**

I find your waiver to be voluntary, knowing and intelligent and will allow it.

TENDER OF GUILTY PLEA OR ADMISSION

Checklist of areas of inquiry

1. **Intelligent waiver**
   a. Age, education, mental illness, ingestion of drugs, alcohol or medication
   b. Reviewed, understood and signed tender of plea form
   c. Knows facts alleged and elements of crimes charged

2. **Right to trial (judge or jury)**
   a. Help select the jury from community
   b. Unanimous verdict
   c. Right to confront witnesses
   d. Right to present evidence on own behalf

3. **Right to be presumed innocent until proved guilty beyond a reasonable doubt**

4. **Knowledge of privilege against self-incrimination**

5. **Judge must be satisfied that there is a factual basis for the plea**

6. **Plea is made voluntarily (no promises, threats or inducements)**

7. **Maximum possible sentence if found in violation while on straight probation**

8. **Imposition of lifetime community parole after a conviction for**
   – Indecent assault and battery on a person 14 years of age or over (c265 §13H),
   – Indecent assault and battery on a child under 14 years of age (c265 §13B),
   – or of an attempt to commit one of those offenses,
   where the complaint alleges and the defendant admits to a prior predicate conviction (see chart)

9. **Had enough time to talk with a lawyer and satisfied with lawyer's advice**

10. **Alien warnings – For every guilty plea or admission (even if no guilty finding) defendant may suffer the consequence of:**
    a. Deportation
    b. Denial of Naturalization
    c. Exclusion from this country

11. **Sex offender registry warnings – Inform the defendant if the offense triggers registration under the Sex Offender Registry statute (see chart)**

12. **Sexually Dangerous Person (SDP) Warning – *Any* submission or change of plea *to any jailable offense* can trigger a sexually dangerous person commitment if the defendant has a prior conviction for a predicate sexual offense. In such cases, a warning must be given (see chart)**

NOTES:

1. ***Required contents of colloquy.*** An adequate plea colloquy must determine that the plea is both intelligently and voluntarily made. For the plea to be *intelligent:* (1) the defendant must know the elements of the offense or admit to facts constituting that offense (this may be done in one of three ways—by the judge explaining to the defendant the elements of the offense, by counsel's representation that he or she has done so, or by the defendant's stated admission to facts recited during the colloquy which constitute the unexplained elements); and (2) the defendant must understand the three constitutional rights that are being waived — the right to jury or bench trial, the right to confront one's accusers, and the privilege against self-incrimination. In determining whether a plea is *voluntary,* the judge should determine whether it is being extracted from the defendant under undue pressure from threats or inducements, whether the defendant is being treated for or is aware of any mental illness, and whether the defendant is under the influence of alcohol or drugs. *Commonwealth v. Correa,* 43 Mass. App. Ct. 714,717-718 (1997).

2. ***Colloquy must explain maximum sentence where straight probation imposed.*** A plea colloquy that will result in a sentence of straight probation must include notice to the defendant of the maximum sentence (and any minimum mandatory sentence) for which the defendant is at risk if he or she violates the terms of the straight probation. *Commonwealth v. Rodriguez,* 52 Mass. App. Ct. 572, 576-578 (2001).

3. ***Colloquy need not warn of collateral consequences.*** Absent a statute or rule, a plea colloquy need not warn the defendant of collateral consequences, including effects on parole, immigration (apart from the alien warnings required by G.L. c. 278, § 29D), future sentencing enhancements, drivers license, firearms license, sex offender registration, or civil litigation. See, e.g., *Rodriguez, supra* at 578. This is true even if the consequence is inevitable. *Commonwealth v. Fraire,* 55 Mass. App. Ct. 916, 918 (2002) (consequence is collateral not because it is indeterminate but because it is "handed down by a body entirely separate from sentencing court).

4. ***Alien warnings must expressly include all three potential consequences.*** General Laws c. 278, § 29D requires a judge to expressly advise a defendant of each of the three potential immigration consequences: (1) deportation, (2) exclusion from admission to the United States, or (3) denial of naturalization. The statute is not satisfied by a warning of generic potential naturalization consequences. *Commonwealth v. Soto,* 431 Mass. 340 (2000).

5. ***Alien warnings required on admission to sufficient facts.*** General Laws c. 278, § 29D requires a judge to give the alien warnings before accepting "a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts." Even prior to the amendment of § 29D by St. 2004, c. 225 (effective July 28, 2004), the Supreme Judicial Court had directed that the alien warnings be given when accepting an admission to sufficient facts. *Commonwealth v. Villalobos,* 437 Mass. 797 (2002); *Commonwealth v. Mahadeo,* 397 Mass. 314 (1986).

6. ***Required colloquy and alien warnings cannot be done in writing.*** The required elements of a colloquy must be done orally in open court. This obligation is not satisfied by the written information on the "Tender of Plea" form, coupled with a general reference to them in an oral colloquy. *Rodriguez, supra* at 574-576. The same is true of the required alien warnings. *Commonwealth v. Hilaire,* 437 Mass. 809 (2002).

7. ***Warnings on Sex Offender Registration statute required.*** General Laws c. 6, § 178E(d) provides that any court which accepts a plea for a sex offense shall inform the sex offender prior to acceptance and require the sex offender to acknowledge in writing that such plea may result in such sex offender being subject to the provisions of the sex offender registration statute. The statute also provides that any "failure to so inform the sex offender shall not be grounds to vacate or invalidate the plea."

8. ***Defendant subject to commitment as a sexually dangerous person regardless of nature of offense to which defendant is pleading guilty.*** Regardless of the current nature of the offense to which the defendant is entering a plea, a prior conviction (or adjudication as a juvenile or youthful offender) for a sexual offense will trigger the statute and require a warning. G.L. c. 123A, § 12. See chart for list of offenses, current or previous, which will trigger statute. The statute anticipates that a petition for classification as a sexually dangerous person will originate while the person is incarcerated. G.L. c. 123A, § 12(a). If no incarceration is anticipated, the statute will not be implicated.

9. ***Lifetime community parole does not apply to first-time sex offenders.*** *Commonwealth v. Pagan,* 445 Mass. 161, 172 (2005), held that the portion of G.L. c. 275, § 18 which permitted the imposition of a term of community parole supervision for life on first-time sex offenders was unconstitutionally vague. However the remaining portions of the statute remain in effect.

10. ***Guilty plea based on joint venture.*** When a defendant pleads guilty based on a joint venture

theory, a mere recitation of the facts of the crime is often insufficient to inform the defendant that an essential element of a joint venture is that "the defendant shared the principal's intent to commit the crime or . . . had reached agreement with the principal to aid in its commission." A guilty plea from a joint venturer cannot stand unless (1) the judge explains the requisite intent in the colloquy, or (2) counsel represents that he or she has done so, or (3) the defendant admits to facts that "necessarily demonstrate" the requisite intent, or (4) the requisite intent is self-evident from the title of the offense to which the defendant pleads (e.g., assault with intent to kill). *Commonwealth v. Argueta,* 73 Mass. App. Ct. 564, 899 N.E.2d 896 (2009).

11. ***Filing.*** If one or more charges are to be filed after a guilty finding, see p. 7 for the additional information that Mass. R. Crim. P. 28(e) requires be given to the defendant.

Sex Offenses Requiring Notification

of Required Sex Offender Registration, Lifetime Community Parole Supervision, or Potential SDP Eligibility

A judge taking a guilty plea or admission to sufficient facts must notify the defendant if he or she: (1) may be required to register as a sex offender, or (2) may be subject to community parole supervision for life, or (3) may be subject to additional punishment based upon the sexually dangerous persons provisions of the General Laws. Mass. R. Crim. P. 12(c)(3)(B).

A judge accepting a plea for one of the sex offenses indicated below must inform the defendant (and obtain his or her written acknowledgement) that he or she may be subject to the sex offender registration provisions of §§ 178C-178P. G.L. c. 6, § 178E(d). A judge entering a conviction for one of the sex offenses indicated below who does not impose a forthwith committed sentence of 90 days or more must inform the defendant (and obtain his or her written acknowledgement) that he or she must register as a sex offender in Massachusetts and in any state of residence. G.L. c. 6, § 178E(c).

Statute	Offense Code	Offense Description *(**Bolded** offenses are within the District Court's final jurisdiction)*	Sex Offender Registration[1]		Subsequent Offense Requires Lifetime Community Parole Supervision[2]	Offense May Trigger SDP Eligibilty[3]
			Required	Exemption May Be Available[4]		
c.6 §178H	6/178H/A 6/178H/B	**SEX OFFENDER FAIL TO REGISTER** **SEX OFFENDER FAIL TO REGISTER, SUBSQ.OFF.** *where (1) offender is a level 2 or 3 sex offender, or (2) underlying sex offense was G.L. c. 265, §§ 13B, 13F, 22A, 23, 24B, or 26 ¶4, or conspiracy or accessory to such an offense, or a like violation in another jurisdiction.*			✓ (whether first or subsequent offense)	
c.265 §13B	265/13B/A 265/13B/B	**INDECENT A&B ON CHILD UNDER 14** **INDECENT A&B ON CHILD UNDER 14, SUBSQ.OFF.**	✓		✓	✓
c.265 §13F	265/13F/A 265/13F/B	INDECENT A&B ON RETARDED PERSON INDECENT A&B ON RETARDED PERSON, SUBSQ.OFF.	✓		✓	✓
c.265 §13H	265/13H	**INDECENT A&B ON PERSON 14 OR OVER**	✓	✓	✓	✓
c.265 §22	265/22/A 265/22/D 265/22/B 265/22/C	RAPE RAPE, SUBSQ.OFF. RAPE, AGGRAVATED RAPE, AGGRAVATED, SUBSQ.OFF.	✓		✓	✓
c.265 §22A	265/22A/A 265/22A/B	RAPE OF CHILD WITH FORCE RAPE OF CHILD WITH FORCE, SUBSQ.OFF.	✓		✓	✓
c.265 §23	265/23/A 265/23/B	RAPE OF CHILD, STATUTORY RAPE OF CHILD, STATUTORY, SUBSQ.OFF.	✓		✓	✓
c.265 §24	265/24/A 265/24/B	ASSAULT TO RAPE ASSAULT TO RAPE, SUBSQ.OFF.	✓		✓	✓
c.265 §24B	265/24B/A 265/24B/B	ASSAULT TO RAPE CHILD c265 §24B ASSAULT TO RAPE CHILD, SUBSQ.OFF.	✓		✓	✓
c.265 §26	265/26/A 265/26/B 265/26/C 265/26/D 265/26/E 265/26/F 265/26/G	KIDNAPPING (¶1) KIDNAPPING FOR EXTORTION (¶1) KIDNAPPING FOR EXTORTION, ARMED (¶2) KIDNAPPING WITH SERIOUS INJURY, ARMED (¶3) KIDNAPPING WITH SEXUAL ASSAULT, ARMED (¶3) KIDNAPPING, ARMED (¶2) KIDNAPPING OF CHILD UNDER 16 (¶4) *with intent to violate §§13B, 13F, 13H, 22, 22A, 23, 24 or 24B*				✓
	265/26/G	KIDNAPPING OF CHILD UNDER 16 (¶4)	✓		✓	
c.265 §26C	265/26C	**ENTICE CHILD UNDER 16**	✓			
c.272 §2	272/2	**PROSTITUTION/UNLAW SEX, ABDUCT PERSON FOR**	✓	✓		✓
c.272 §3	272/3	SEXUAL INTERCOURSE, DRUG FOR	✓		✓	✓
c.272 §4A	272/4A	PROSTITUTION, INDUCE MINOR TO	✓			✓
c.272 §4B	272/4B	PROSTITUTION, DERIVE SUPPORT FROM CHILD	✓			✓
c.272 §16	272/16/A	**LEWDNESS, OPEN AND GROSS**				✓
	272/16/B	**LEWDNESS, OPEN AND GROSS, SUBSQ.OFF.** *where offense is second or subsequent criminal, delinquency or juvenile offender conviction or adjudication, exclusive of any first-offense delinquency adjudication before 8/1/92*	✓	✓		✓

Statute	Offense Code	Offense Description *(**Bolded** offenses are within the District Court's final jurisdiction)*	Sex Offender Registration[1]		Subsequent Offense Requires Lifetime Community Parole Supervision[2]	Offense May Trigger SDP Eligibilty[3]
			Required	Exemption May Be Available[4]		
c.272 §17	272/17	INCEST c272 §17	✓	✓		
	272/17	INCEST c272 §17 *where victim is under age 21*	✓	✓		✓
c.272 §28	**272/28/A** **272/28/B** **272/28/C**	**OBSCENE MATTER TO MINOR** **OBSCENE MATTER TO MINOR, 2ND OFF.** **OBSCENE MATTER TO MINOR, 3RD OFF.**	✓			✓
c.272 §29A	272/29A/A 272/29A/B	CHILD IN NUDE, LASCIVIOUS POSE/EXHIBIT CHILD IN SEXUAL ACT, POSE/EXHIBIT	✓			✓
c.272 §29B	272/29B/A 272/29B/B	CHILD IN NUDE, DISTRIB MATERIAL OF CHILD IN SEXUAL ACT, DISTRIB MATERIAL OF	✓			✓
c.272 §29C	**272/29C/A**	**CHILD PORNOGRAPHY, POSSESS**	✓	✓		✓
	272/29C/B 272/29C/C	CHILD PORNOGRAPHY, POSSESS, 2ND OFF. CHILD PORNOGRAPHY, POSSESS, 3RD OFF.	✓	✓		✓
c.272 §35A	**272/35A/A**	**UNNATURAL ACT WITH CHILD UNDER 16**	✓		✓	✓
	272/35A/B	UNNATURAL ACT WITH CHILD UNDER 16, SUBSQ.OFF.	✓		✓	✓
c.272 §53	**272/53/D**	**ACCOST/ANNOY PERSON OF OPPOSITE SEX**				✓
	272/53/E	**LEWD, WANTON & LASCIVIOUS CONDUCT**				✓
c.274 §6	**274/6**	**ATTEMPT TO COMMIT CRIME** *for any substantive crime listed above*	*same as substantive crime above*			✓
		OUT-OF-STATE ATTEMPT OFFENSES	*same as substantive crime above*			✓

NOTES

[1] This table reflects amendments to the Sex Offender Registration Law (G.L. c. 6, §§ 178C-178Q) through St. 2006, c. 303 (effective December 20, 2006). This chart was current as of April 2009. For the most recent version of the chart please refer to the District Court intranet page.

[2] Community parole supervision for life is mandatory upon conviction of these offenses if the defendant has "one or more prior convictions of indecent assault and battery, rape, assault with intent to commit rape, unnatural and lascivious acts, drugging for sex, kidnap or of any offense which is the same as or necessarily includes the same elements of said offense." G.L. c. 265, § 45; c. 275, § 18. In *Commonwealth v. Pagan,* 445 Mass. 161, 834 N.E.2d 240 (2005), the S.J.C. held the portions of § 18 which permit the optional imposition of lifetime community parole supervision for first-offense convictions to be unconstitutionally vague.

Lifetime community parole supervision is also required for anyone convicted of failing to register as a sex offender if: (1) they have been categorized as a level 2 or 3 sex offender, or (2) their underlying sex offense was G.L. c. 265, §§ 13B (indecent A&B on a child under 14), 13F (indecent A&B on a retarded person), 22A (rape of a child with force), 23 (statutory rape), 24B (assault to rape a child), or 26 ¶ 4 (kidnapping of a child under 16), or conspiracy or accessory to such an offense, or a like violation in another jurisdiction. G.L. c. 6, § 178H(a)(1)-(3).

[3] Among the requirements for commitment as a sexually dangerous person is a prior conviction, or a delinquency or youthful offender adjudication, for one of these sex offenses. See G.L. c. 123A, §§ 1, 12.

[4] These offenses are neither "sex offenses involving a child" nor "sexually violent offenses" (as defined in G.L. c. 6, § 178C) and therefore, subject to other specified requirements, the offender may be eligible under § 178E(e) or (f) for exemption from registration. Section 178E(e) permits a sentencing judge, on motion of the prosecutor, to exempt an eligible defendant from the registration requirement if "the circumstances of the offense in conjunction with the offender's criminal history does not indicate a risk of reoffense or a danger to the public." Section 178E(f) directs the sentencing judge to consider the same issue sua sponte within 14 days of sentencing if an eligible defendant is not sentenced to immediate confinement.

4//09

WAIVER OF COUNSEL

Ms./Mr. _____, you have the right to have an attorney represent you in this matter. If you are indigent or partially indigent, that attorney will be provided to you largely or entirely at the state's expense. As you probably understand, an attorney is a person with special training and experience in the law who is able to provide advice and guidance to a person facing criminal charges.

You do have an absolute constitutional right to represent yourself in this matter if you choose. Neither the prosecutor nor I is your attorney, working solely for what is best for you. If you choose to represent yourself in this matter and waive your right to an attorney, you run the risk that the result might not be what you expect and you may overlook some defense or future consequence an attorney might have seen for you. The maximum sentence for the offense with which you are charged, should you be convicted, is ___*[maximum sentence]*___ in the House of Correction. You should be aware that, even though you are not an attorney, all court rules, including the rules of evidence, will apply to this trial.

How old are you?

How far did you go in school?

Today, do you have any mental or psychological problems that interfere with your ability to understand me or make decisions?

Have you had any drugs, alcohol or medicine today?

> *If yes to medicine:* **Is this medicine prescribed by a doctor? Are you taking it as prescribed? Does it interfere with your ability to understand me or make decisions?**

Have you understood everything I have said?

Is it still your wish, after having heard me, to waive your right to an attorney, understanding that you will not be able to change your mind later, and instead to represent yourself on this charge of ___*[offense]*___**?**

I find your waiver voluntary, knowing and intelligent and will allow it.

WAIVER OF FIFTH AMENDMENT RIGHTS BY WITNESS

First determine whether the witness is entitled to assert the privilege.

Ms./Mr. _____[witness]_____, I have learned that you are present today to testify as a witness in the case of Commonwealth vs. _____. Is that correct?

I have been told that some of your testimony may tend to incriminate you. You have a constitutional right not to incriminate yourself. Therefore, because you may make statements during your testimony that tend to show that you are guilty of _____[Offense(s)]_____ , and it is possible that you could be charged with (that crime) (those crimes), you have a right not to testify in this case.

If you choose not to testify, you will be immediately excused as a witness in this case. If you choose to testify, and give up your right not to incriminate yourself, then you must answer all questions that I rule are proper. You will not have a choice to answer some questions and refuse to answer others.

If you so request, I will appoint an attorney to represent you and help you make this decision. This attorney will represent you, and no one else, in this case. Do you wish the Court to appoint counsel?

After counsel has consulted with witness:

Have you had enough time to consider your right not to testify? What is your decision?

If the witness exercises the right not to testify, he or she is excused. If the witness wishes to testify, the witness is sworn.

I am now going to ask you a few questions, only about your decision to give up your right nor to incriminate yourself, and to testify in this case.

What is your name, age, and how far have you gone in school?

In the past 24 hours, have you taken any medications, drugs or alcohol? In the past have you suffered, or do you now suffer, from any mental illness?

Do you understand that if you give up your right not to testify in this case, you will be required to answer every question that you are asked, and that you will not have any further right to refuse to answer any question that I rule is a proper question?

Have any threats or promises been made to cause you to give up your right not to incriminate yourself?

If counsel was consulted: **Have you had enough time to consult with your lawyer about this issue?**

I find that the witness has voluntarily waived (her) (his) privilege against self-incrimination.

NOTES:

1. ***Court should intervene if appropriate.*** While such intervention on behalf of a witness is not required, it is a "commendable practice" for the judge to intervene and advise the witness in certain circumstances, where the witness is ignorant, misinformed or confused about his rights, and there is danger to the witness in the testimony sought to be elicited. *Taylor v. Commonwealth,* 369 Mass. 183, 192 (1975), and cases cited. A voir dire may be conducted, in which the judge advises the witness generally about the privilege against self-incrimination and the attendant risks of prosecution, and appoints counsel. *Commonwealth v. Crawford*, 12 Mass. App. Ct. 776, 779-780 (1981).

The judge should avoid using any language which could be viewed as exerting pressure on the witness so as to preclude a voluntary choice whether to testify – e.g., the judge should avoid *undue* emphasis on the seriousness of the crime(s) for which the witness could be charged, or on the maximum penalties for such crime(s), or that the witness need not testify. Counsel may be appointed to fully advise the witness on these matters. See *Commonwealth v. Guadalupe*, 54 Mass. App. Ct. 1110 (2002) (unpublished opinion under Appeals Court Rule 1:28).

"It is for a judge, rather than a witness or his attorney, 'to decide whether a witness'[s] silence is justified.'" *Commonwealth v. Martin*, 423 Mass. 496, 502 (1966), quoting *In re Morganroth*, 718 F. 2d 116, 167 (6th Cir. 1983).

2. ***Justification for claim of privilege.*** "A witness may refuse to testify unless it is '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate (emphasis in original).'" *Martin, supra* at 502, quoting *Commonwealth v. Funches*, 379 Mass. 283, 289 (1979). In determining the propriety of the claim of privilege, broad standards, highly protective of the constitutionally guaranteed right against self-incrimination, are applied. *Id.* Cf. *Commonwealth v. Sasu*, 404 Mass. 596, 600 (1989); *Taylor v. Commonwealth*, 369 Mass. 183, 187 (1975).

The privilege extends to answers that would in themselves support a conviction, and also those answers that would "'furnish a link in the chain of evidence needed to prosecute the claimant.'" *Commonwealth v. Borans*, 388 Mass. 453, 456 (1983), quoting in part from *Hoffman v. United States*, 341 U.S. 479, 486, 488 (1951). The privilege is a fundamental principle secured by the Fifth Amendment and by art. 12 of the Massachusetts Declaration of Rights, to be liberally construed in favor of the person claiming it. *Commonwealth v. Koonce*, 418 Mass. 367, 378 (1994).

3. ***Witness convicted of crime: immunized as to the details of that crime, but privileged if exposed to prosecution for related crime.*** A witness is effectively immunized by, and may not refuse to testify about, a crime of which he or she has been convicted; however, the witness does not lose the Fifth Amendment right to refuse to testify concerning other matters or transactions not included in that conviction. *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 305 (1991); *Borans,s upra* at 459.

A witness who has been convicted of a crime may nevertheless assert a Fifth Amendment privilege if testimony regarding the episode could expose him to prosecution for a related crime, such as conspiracy. See *Commonwealth v. Francis*, 375 Mass. 211, 215-216, cert. denied, 439 U.S. 872 (1978). It is irrelevant that such a prosecution is unlikely. *Id.* at 216. The claim of privilege should be allowed "if there was even slender ground for apprehending that testimony on the part of [the witness] might tend to incriminate him." *Colantonio, supra; Commonwealth v. LaBonte*, 25 Mass. App. Ct. 190, 196 (1987).

The witness's decision to invoke his Fifth Amendment privilege is not to be "balanced" against a defendant's Sixth Amendment right to confront witnesses. *Colantonio, supra at 306*, citing *Francis, supra* at 215.

4. ***Fear of prosecution for perjury.*** A judge is not bound by a witness's bald assertion that if required to testify, she or he may be exposed to charges of perjury because there is the possibility of material differences between the proposed testimony and testimony the witness previously gave before the grand jury. The judge has a duty to determine that invocation of the privilege is proper in the circumstances of the case. The circumstances must clearly indicate a real risk that the witness's answers will tend to indicate his/her involvement in illegal activity, "and not a mere imaginary, remote or speculative possibility of prosecution." *Martin, supra,* quoting *In re Morganroth*, 718 F2d 161, 167 (6th Cir. 1983).

5. ***No blanket assertion of privilege.*** A witness also is not entitled to make a blanket assertion of the privilege. The privilege must be asserted with respect to particular questions, and the possible incriminatory potential of each proposed question, or area which the prosecution might with to explore, must be considered. *Martin, supra.* However, a witness may claim the privilege if his new testimony might suggest that he had perjured himself in testifying on the same subject at a prior proceeding. *Borans, supra* at 457, quoting *United States v. Partin*, 552 F.2d 621, 632 (5th Cir.), cert. denied, 434 U.S. 903 (1977).

6. ***In camera hearing sometimes appropriate.*** If the witness makes a claim of privilege and the judge determines that there is insufficient information available to verify the assertion of the privilege, the judge may conduct a *carefully limited in camera hearing* with the witness and the witness's counsel. The hearing *should be on the record under seal*, and thus preserved for appellate review if a claim is made that the witness improperly invoked the privilege. See *Martin, supra* at 504-505.

7. ***Prosecutor asserts the witness will not be prosecuted.*** The prosecutor's denial of an intent to prosecute a witness is not sufficient to defeat an assertion of the privilege. *Borans, supra* at 459, and cases cited. Furthermore, neither a practical unlikelihood of prosecution nor the prosecutor's denial of an intention to prosecute negates an otherwise proper invocation of the Fifth Amendment. *Borans, supra* at 459; *Colantonio, supra.*

8. ***Waiver by testimony.*** A witness who voluntarily testifies regarding an incriminating fact waives his privilege against self-incrimination "as to subsequent questions seeking related facts." *Taylor, supra* at 189. The waiver by testimony rule applies only "to the proceeding in which [the testimony] is given and does not extend to subsequent proceedings." *Id.* at 191.

9. ***Waiver of privilege must be voluntary; need not be "knowing and intelligent."*** In determining whether there was a "waiver by testimony," it is relevant, but not dispositive of the issue, whether the witness had been advised concerning the privilege immediately prior to testifying. *Commonwealth v. King*, 436 Mass. 252, 260 (2002).

WAIVER OF JURY TRIAL

Ms./Mr. _____, I have been given a form which suggests that you wish to waive your right to a jury trial. Did you read, discuss with Attorney _____ and understand this form before you signed it?

You have the right to one trial on the charge(s) against you. That trial could either be before a single judge like me or it could be before a judge with a jury of six. If you ask for a jury, you and your attorney can help choose the jury from the people of this county to assure that they are fair and to challenge two of them for any reason. A judge would instruct the jury in the law, but they would be the ones to decide the facts. All six jurors would have to agree before you could be found guilty. If you waive, or give up, your right to a jury, you would allow a judge like me to decide both the facts and the law and whether you are guilty. As a practical matter that one person's decision on the facts would be final.

Do you understand the difference between a judge trial and a jury trial?

Have you discussed this with Attorney _____ ?

How old are you?

How far did you go in school?

Today, do you have any mental or psychological problems that interfere with your ability to understand me or make decisions?

Have you had any drugs, alcohol or medicine today?

If yes to medicine: **Is this medicine prescribed by a doctor? Are you taking it as prescribed? Does it interfere with your thinking?**

Have you understood everything I have said?

Is it still your wish, after having heard me and spoken with your attorney, to irrevocably waive your right to a jury trial on the charge(s) of ____*[offense(s)]*____ **and instead have a trial before a single judge?**

I find your waiver voluntary, knowing and intelligent and will allow it.

NOTE:

Jury waiver invalid if not in writing. A valid waiver of jury trial requires both an oral colloquy and the written waiver required by G.L. c. 263, § 6. The absence of the written waiver invalidates the defendant's jury trial waiver, even if there was a colloquy and the oral waiver was voluntary in fact. *Commonwealth v. Pavao,* 423 Mass. 798 (1996); *Commonwealth v. Wheeler,* 42 Mass. App. Ct. 933 (1997).

WAIVER OF PROBATION VIOLATION HEARING

Do you understand that I am not bound by any agreement that your lawyer and the probation officer may have made? Do you still want to admit that you have violated the terms of your probation?

How old are you?

How far have you gone in school?

Have you taken any drugs, medication or alcohol in the last 24 hours?

Have you ever been treated for, or are you aware of, any mental condition or illness from which you are now suffering?

Do you understand that you have a right to a full hearing during which the Probation Department would be required to produce evidence which convinces me by a preponderance of the evidence that you have violated the terms of your probation? When you admit that you violated the terms of your probation, you give up the right to have a hearing and leave it to me to sentence you, after hearing from the probation officer and your lawyer, in accordance with the law.

Have you had enough time to discuss this decision with your

lawyer?

May I please hear what terms of probation have been violated and the factual basis for the allegations?

I find that there is a basis in fact and law for the admission and I accept the admission as made knowingly and intelligently with knowledge of its consequences.